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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Bradley L Nelson,

No. CV-21-00455-TUC-JCH

Plaintiff,

ORDER

V.

County of Pima, et al.,

Defendant.

Before the Court is pro se Plaintiff Bradley L. Nelson's ("Plaintiff") First Amended Complaint ("FAC"). (Doc. 6.) Plaintiff was previously granted leave to proceed in forma pauperis and his Complaint was screened and dismissed without prejudice pursuant to 28 U.S.C. §1915(e)(2). (Doc. 5.) Plaintiff was given leave to file an amended complaint by January 8, 2022, which he did. (Doc. 5). The Court will again screen the FAC pursuant to 28 U.S.C. §1915(e)(2) before it is allowed to be served. For the reasons set forth below, the FAC will be allowed to proceed.

I. BACKGROUND

The FAC alleges the following: Plaintiff is an adult male over the age of forty and suffers from "...a history of disability [sic], permanent shoulder damage..., heart disease, permanent heart damage, history of a [sic] physical difficulties in walking, permanent elbow damage..., loss of hearing (wears hearing aids)[,] and permanent loss of enjoyment

1 of life.” (Doc. 6 at 13.) Plaintiff also receives social security disability benefits. (*Id.* at 9.)

2 In November 2014, Plaintiff filed a claim against Defendant Pima County (“Pima
 3 County”) with the Equal Employment Opportunity Commission (“EEOC”) and the Civil
 4 Rights Division of the Arizona Attorney’s General’s Office (“Attorney General”). (Doc. 6
 5 at 6.) Plaintiff asserts that no findings were made, yet Pima County “changed their
 6 procedures regarding discrimination … after that investigation.” (*Id.*) Plaintiff does not
 7 provide details regarding the facts underlying the 2014 EEOC charge. After an
 8 investigation into the 2014 EEOC charge, Plaintiff asserts that at least one Pima County
 9 employee shared that it was too costly to consider Plaintiff for employment at Pima County
 10 because he was engaged in EEOC litigation. (Doc. 6 at 6.)

11 In 2019 and 2020, he applied for two open positions—specifically as an ITD
 12 “Information Technology Home” Business Systems Analyst and a Property
 13 Appraiser/Trainee—with Pima County. (Doc. 6 at 4, Doc. 6 Ex. A, B.) Plaintiff
 14 unsuccessfully applied three times for the Property Appraiser/Trainee position despite
 15 being “qualified at all times.” (Doc. 6 at 3.) Plaintiff applied for the Business Systems
 16 Analyst position and was not hired despite his relevant skills “setting up businesses, data
 17 systems, [search engine optimization] and [search engine marketing] to meet the needs of
 18 a community or organization” and his previous experience. (Doc. 6 at 3-5.) Separately,
 19 Plaintiff sent materials “showing his qualifications for the prospective jobs” to Pima
 20 County Board Supervisor Richard Elias as Plaintiff had previously experienced problems
 21 with Pima County employees including Deborah Roe, Rosemary Smith, Vera
 22 Wesetermann, and Jim Mize. (Doc. 6 at 3, 5.) At some unspecified time, Plaintiff was
 23 granted an interview for a Pima County Position. (Doc. 6 at 9.) During his interview,
 24 Plaintiff wore a neck brace and “explained [his] disabilities[.]” (Doc. 6 at 9.) At another
 25 unspecified time, Plaintiff applied for a clerical position at Pima County but he was not
 26 hired or offered an interview despite demonstrating a baseline qualification by passing a
 27 “clerical test.” (Doc. 6 at 7.)

28 Plaintiff alleges Pima County hiring authorities subjected him to differential

1 treatment during his application process. (Doc. 6 at 7). In addition to characterizing
 2 Plaintiff as litigious, Pima County allegedly misrepresented their attempts to contact the
 3 Plaintiff regarding available positions, mishandled his application by claiming they did not
 4 have Plaintiff's driver's license on file then backtracked when it was discovered, and
 5 conducted an "unlawful" search into his personal background which impermissibly
 6 spanned into his high school history. (Doc. 6 at 5, 7.) Plaintiff does not allege what
 7 information, if any, was discovered or used against him, or how the search was unlawful.

8 Pima County did not hire Plaintiff for any position. (Doc. 6 at 6.)¹ Plaintiff
 9 characterizes Pima County's conduct during his application process, and their decision to
 10 not hire him, as discrimination based on Plaintiff's age and disability and as retaliation
 11 based on his 2014 EEOC complaint. Plaintiff alleges that "[s]imilarly situated younger
 12 persons were hired" instead of him. (Doc. 1 at 5.) Specifically, Plaintiff indicates that he
 13 saw "at least 50" new hires at the Pima County One Stop location, all "clearly under the
 14 age of forty," and some revealed they had applied through the clerical testing process that
 15 Plaintiff had used. (Doc. 6 at 7.) Plaintiff also asserts, "...Pima County provided reasonable
 16 accommodations to other similarly situated employees/salespersons while denying Mr.
 17 Nelson an accommodation." (Doc. 5 at 5, 7.)

18 In November 2020, Plaintiff filed a claim with the EEOC and Attorney's General's
 19 Office. (Doc. 6 at 13; Doc. 6 at Ex. C.) On August 6, 2021, Plaintiff was issued a right-to-
 20 sue letter under Charge No. 35A-2021-00056C. (Doc. 6 at Ex. C.) Although Plaintiff
 21 attached the right-to-sue letter to his FAC, he did not provide details on his underlying
 22 charge submitted to the EEOC or Attorney General. (Doc. 6 at Ex. C.)

23 In Count I, Plaintiff alleges violations of the Americans with Disabilities Act
 24 ("ADA"). In Count II, Plaintiff alleges a claim of age discrimination based on the Age
 25 Discrimination in Employment Act. In Count III, Plaintiff alleges retaliation under Title
 26 VII of the ADA. Plaintiff requests damages and injunctive relief. (Doc. 6 at 16-17.)

27
 28 ¹ From 2012 to 2021, Plaintiff claims that he unsuccessfully applied approximately fifty times for various positions including entry level positions at Pima County (Doc. 6 at 3). The crux of his FAC centers on his applications during 2019 and 2020.

1 **I. *In Forma Pauperis* Screening**

2 **A. Standard of Review**

3 The Court has a statutory obligation to screen a *pro se, in forma pauperis* complaint
 4 before ordering it served. 28 U.S.C. § 1915(e)(2). “[S]ection 1915(e) not only permits but
 5 requires a district court to dismiss an in forma pauperis complaint that fails to state a claim.”
 6 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). A district court must screen and
 7 dismiss actions filed by a plaintiff *in forma pauperis* if the action is “frivolous or
 8 malicious,” “fails to state a claim on which relief may be granted,” or “seeks monetary
 9 relief against a defendant who is immune from relief.” 28 U.S.C. § 1915(e)(2)(B); *see also*
 10 *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001).

11 Screening orders apply the same standard applied to a Federal Civil Rule 12(b)(6)
 12 motion to dismiss. *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). A complaint
 13 under Rule 12(b)(6) must contain a “short and plain statement of the claim showing that
 14 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A formulaic recitation of a cause
 15 of action with conclusory allegations is insufficient; a plaintiff must plead facts pertaining
 16 to his own case making a violation “plausible,” not just “possible.” *Ashcroft v. Iqbal*, 556
 17 U.S. 662, 677–79 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)) (“A
 18 claim has facial plausibility when the plaintiff pleads factual content that allows the court
 19 to draw the reasonable inference that the defendant is liable for the misconduct alleged.”).
 20 The “mere possibility of misconduct” or “unadorned, the defendant-unlawfully-harmed me
 21 accusation[s]” fall short of meeting this plausibility standard. *Id.*

22 **II. Analysis**

23 **A. Exhaustion of Administrative Remedies**

24 A private or state employee who believes he has been discriminated must file a
 25 complaint with the EEOC within 180 days of the alleged discrimination. 29 U.S.C. § 626(d)
 26 (2000). The party must file an action within 90 days of receiving a right-to-sue letter from
 27 the EEOC. *See* 42 U.S.C. § 2000e–5(f)(1) (Title VII); 42 U.S.C. § 12117(ADA); 29 U.S.C.
 28 § 626(e) (ADEA); *O'Donnell v. Vencor Inc.*, 466 F.3d 1104, 1111 (9th Cir.2006) (per

1 curiam) (finding Title VII and ADEA claims were untimely because complaint was filed
 2 more than 90 days after EEOC's issuance of right-to-sue letter).

3 Plaintiff filed his initial Complaint on November 5, 2021, within 90 days after
 4 receiving his right-to-sue letter issued on August 6, 2021. (Doc. 6 at Ex C.) The Court will
 5 presume the scope of the claims alleged in his FAC track the claims made in his charge to
 6 the EEOC and Attorney General for purposes of administrative exhaustion. *See Leong v.*
 7 *Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003) (explaining that only claims “like or reasonably
 8 related to allegations” raised in EEOC charge and investigation are within the district
 9 court’s jurisdiction) (citation and internal quotation marks omitted).

10 **B. Count I: ADA Claim**

11 To state a claim for disability discrimination under the ADA, a plaintiff must
 12 plausibly allege that he: (1) is a disabled person within the meaning of the ADA; (2) is
 13 qualified, with or without reasonable accommodation, to perform the essential functions of
 14 the job; and (3) suffered an adverse employment action because of his disability. *Bradley*
 15 *v. Harcourt, Brace & Co.*, 104 F.3d 267, 271 (9th Cir. 1996); *see* 42 U.S.C. § 12112.

16 Plaintiff alleges specific facts to support that he is disabled within the meaning of
 17 the ADA. According to Plaintiff, Pima County was aware of his disabilities based on his
 18 explanation to them, his previous interactions with Pima County hiring authorities, and his
 19 2014 EEOC charge and investigation. Plaintiff alleges facts to support his qualifications,
 20 with or without reasonable accommodations, to perform the essential functions of the Pima
 21 County positions for which he applied. Plaintiff further alleges that Pima County failed to
 22 provide a reasonable accommodation, to include a “hearing devi[c]e for call center work
 23 and...accommodations for standing or sitting extended periods of time” and that Pima
 24 County did not hire him based on his disability. (Doc. 6 at 13.) Plaintiff has stated a
 25 plausible disability discrimination claim.

26 **C. Count II: ADEA Claim**

27 The ADEA prohibits an employer from failing to hire, discharging, or otherwise
 28 discriminating on the basis of age against an individual who is at least 40 years of age. 29

1 U.S.C. § 623(a)(1). Under the failure to hire standard, “[a] plaintiff makes out a prima facie
 2 case of intentional discrimination under the ADEA if he demonstrates [1] that he was
 3 within the protected class of individuals between forty and seventy years of age, [2] that
 4 he applied for a position for which he was qualified, and [3] that a younger person with
 5 similar qualifications received the position.” *Cotton v. City of Alameda*, 812 F.2d 1245,
 6 1248 (9th Cir. 1987) (emphasis added).

7 Plaintiff alleges a plausible claim for age discrimination. Plaintiff alleges that he is
 8 at least 40 years of age and was not selected for a clerical position, for which he was vetted
 9 through Pima County’s clerical testing process. Plaintiff alleges that younger, equally
 10 qualified individuals were hired, after completing the same clerical testing process. While
 11 the factual allegations in the FAC related to Count II are sparse, the Court concludes that
 12 they are minimally sufficient to make a violation of the ADEA plausible.

13 **D. Count III: Title VII Retaliation**

14 To state a claim of retaliation under Title VII, Plaintiff must put forth evidence
 15 sufficient to show that (1) he engaged in a protected activity, (2) he suffered an adverse
 16 employment action, and (3) there was a causal link between his activity and the
 17 employment decision. *See Hashimoto v. Dalton*, 118 F.3d 671, 679 (9th Cir.1997).
 18 Protected activity includes the filing of a charge or a complaint, or providing testimony
 19 regarding an employer's alleged unlawful practices, as well as engaging in other activity
 20 intended to “oppose[]” an employer's discriminatory practices. 42 U.S.C. § 2000e-3(a).

21 Plaintiff alleges Rosemary Smith “actively engaged in a pattern of acts to solicit
 22 other community leaders to … deprive the Plaintiff [of] the opportunity of employment…
 23 by claiming and propagating the notion [that] Plaintiff was engaged in EEOC litigation
 24 which was too costly to consider Plaintiff for employment.” (Doc. 6 at 6.) Because of his
 25 involvement in a discrimination EEOC charge against Pima County in 2014, Plaintiff
 26 alleges that he was blacklisted, and Pima County’s failure to hire him amounts to retaliation
 27 under Title VII. Count III will be allowed to proceed.
 28

1 **III. Order**

2 **IT IS ORDERED:**

- 3 1. Defendant Pima County must answer the First Amended Complaint (Doc. 6.) or
4 otherwise respond by appropriate motion within the time provided by the
5 applicable provisions of Rule 12(a) of the Federal Rules of Civil Procedure.
- 6 2. The Clerk of Court must send Plaintiff a service packet including the First
7 Amended Complaint, this Order, and both summons and request for waiver forms
8 for Defendant Pima County.
- 9 3. Plaintiff must complete and return the service packet to the Clerk of Court within
10 21 days of the date of filing of this Order. The United States Marshal will not
11 provide service of process if Plaintiff fails to comply with this Order.
- 12 4. If Plaintiff does not either obtain a waiver of service of the summons or complete
13 service of the Summons and Complaint on a Defendant within 90 days of the
14 filing of the Complaint or within 60 days of the filing of this Order, whichever is
15 later, the action may be dismissed as to each Defendant not served. Fed. R. Civ.
16 P. 4(m); LRCiv 16.2(b)(2)(B)(ii).
- 17 5. The United States Marshal must retain the Summons, a copy of the First
18 Amended Complaint, and a copy of this Order for future use.
- 19 6. The United States Marshal must notify Defendant Pima County of the
20 commencement of this action as soon as practicable and request waiver of service
21 of the summons pursuant to Rule 4(d) of the Federal Rules of Civil Procedure.
22 The notice to Defendant must include a copy of this Order. **The Marshal must**
23 **immediately file signed waivers of service of the summons. If a waiver of**
24 **service of summons is returned as undeliverable or is not returned by**
25 **Defendant within 15 days from the date the request for waiver was sent by**
26 **the Marshal, the Marshal must:**
- 27 A. personally serve copies of the Summons, Complaint, and this Order upon
28 Defendant pursuant to Rule 4(e)(2) and (h)(1) of the Federal Rules of

1 Civil Procedure, as appropriate; and

2 B. within 10 days after personal service is made, file the return of service for
3 Defendant, along with evidence of the attempt to secure a waiver of
4 service of the summons and of the costs subsequently incurred in
5 effecting service upon Defendant. The costs of service must be
6 enumerated on the return of service form (USM-285) and must include
7 the costs incurred by the Marshal for photocopying additional copies of
8 the Summons, First Amended Complaint, or this Order and for preparing
9 new process receipt and return forms (USM-285), if required. Costs of
10 service will be taxed against the personally served Defendant pursuant to
11 Rule 4(d)(2) of the Federal Rules of Civil Procedure, unless otherwise
12 ordered by the Court.

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14 Dated this 12th day of January, 2022.

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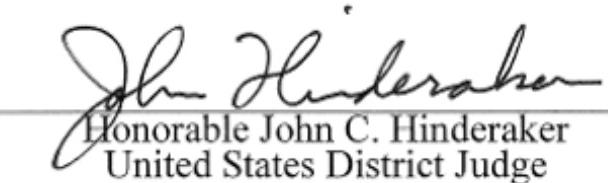
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Honorable John C. Hinderaker
United States District Judge